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February 25, 2019

Mr. John Shelton, Executive Director
San Joaquin River Conservancy
5469 East Olive Avenue
Fresno, CA 93727

**Re: Item F-1 of San Joaquin River Conservancy
Agenda for February 27, 2019
Re: River West Fresno, Eaton Trail Extension Project Deliberations**

Dear Mr. Shelton:

This letter is provided on behalf of my clients Cliff Tutelian and Tutelian & Co., Inc., who own interests in properties near the proposed San Joaquin River Conservancy River West Fresno Eaton Trail Extension Project (the "Project"). Please ensure this letter is distributed to all members of the Board of the San Joaquin River Conservancy prior to its February 27, 2019 meeting, and include this letter in the Record of Proceedings regarding the consideration of the Project by the Conservancy.

As an owner of property in the immediate vicinity of the Project, my client will be severely impacted by any elements of the Project that are ill considered, poorly maintained, or which impact sites of hazardous waste disposals on the river bottom. Those potential impacts were the subject of several letters previously provided to the Board during its prior deliberations before Alternative 5B was adopted.

I ask that my prior letters regarding the Project, December 11, 2017, September 12, 2017, June 6, 2017, and April 13, 2017, and their enclosures, and which are part of the existing Administrative Record for the Project, be incorporated by this reference. In addition, for convenience of reference I am providing further copies of those letters, but omitting the enclosures.

1. Alternative 5B must continue to be Implemented, Absent a Subsequent Lawful Repeal or Amendment to Resolution 17-01.

The published Agenda describes an unreasonably broad range of actions that may be undertaken pursuant to the renewed deliberations. The problems associated with such a confusing portrayal of relevant options are detailed in Section 4 below. However, all of those concerns and issues can be avoided if the Board adheres to relevant legal standards that apply to the present circumstances.

Specifically, based on the prior vote to rescind all three votes conducted at the January 9, 2019 meeting, no action has been taken to amend or rescind Resolution 17-01. It is still the relevant existing policy of the Board. Absent a lawful action to amend or rescind Resolution 17-01 the Board must continue its implementation. The Board must therefore be focused on conducting the ministerial task of implementing the terms of Resolution 17-01, as adopted. (*California School Board Assn v. State Board of*



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Education (2010) 186 Cal.App.4th 1298, 1325, citing *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 186 Cal.App.3d 814, 834-835).

The record of this matter provides overwhelming evidence that all benchmarks for attaining reasonable progress toward implementing Alternative 5B were attained by San Joaquin River Access Corporation ("SRJAC"), except for matters where full compliance was frustrated by actions of the Wildlife Conservation Board and the Conservancy. Those circumstances are detailed in the February 8, 2019 letter issued by Mr. John Kinsey on behalf of the SJRAC. That letter is incorporated by this reference.

The Board has a present duty to implement of Alternative 5B, absent a lawful act to amend or rescind Resolution 17-01. A procedural tie vote resulting in a "technical denial" is not a sufficient legal basis to fail to comply with the ministerial duties that the Board is presently required to conduct.

2. Reliance Conducted By Third Parties, and Principles of Equal Protection, Restrain the Board's Ability To Retroactively Repeal or Amend Resolution 17-01 Under the Ruse That the Specified Benchmarks Were Not Satisfied.

Many interested parties reasonably relied upon the expectation that the Board would comport itself consistent with the standards set forth in Resolution 17-01. This reliance is evidenced in the February 8, 2019 letter issued on behalf of SJRAC. That letter details the actions undertaken to acquire the intended property interests, entitlements and hazardous waste evaluations required by Resolution 17-01.

Other parties also relied on the Board's good faith compliances with Resolution 17-01, including my client, who declined to initiate litigation challenging the severely flawed EIR that was relied upon for the approval of the Project described in Resolution 17-01. Key flaws that EIR are detailed in the enclosed December 11, 2017 letter.

Principles of estoppel and vested rights may not be squarely applicable to the Board's considerations of a public project. However, the Board's actions and private party reliance they created, involve several factors that Courts have held establish vested rights that cannot be unreasonably revoked. (*HOT IHG-1 Properties Trust v. City of Anaheim* (2015) 243 Cal.App.4th 188; *Goat Hill Tavern v. City of Costa Mesa* (1992) 6 Cal.App.4th 1519). Principles of estoppel and vested rights therefore provide a strong basis to hold the Board accountable for any failure to strictly comply with the legal requirements to properly conduct its present ministerial task of implementing the terms of Resolution 17-01.

Other important legal standards also protect private parties from unreasonable and arbitrary conduct of government agencies. Among these are the "Class of One" Equal Protection standards established by the US Supreme Court in *Village of Willowbrook v. Olech* (2000) 528 U.S. 562, and recognized by California courts in

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Genesis Environmental Service v. San Joaquin Valley Air Pollution Control District (2003) 113 Cal.App.4th 597. These cases confirm that a person singled out for arbitrary treatment by government authorities may pursue an equal protection claim. That arbitrary discrimination can arise from improper execution of governing laws by duly constituted officials or agents. In this instance, the Board unreasonably and arbitrarily failed to properly assess and confirm that the benchmarks for reasonable progress toward implementing Alternative 5B were satisfied by SRJAC in accordance with Resolution 17-01. It is now proposed that the Board contemplate amending or rescinding Resolution 17-01, despite the fact that the benchmarks were previously satisfied. This conduct reflects the type of "irrational and wholly arbitrary" conduct that the *Olech* court found violates individual rights.¹

3. Any Board Action to Change Course from Implementing the Existing Approved Project Will Entail Significant Delays and Legal Exposures.

a. Pursuing Alternative 1 Requires Adopting a Legally Infirm Statement of Overriding Considerations, Substantial Further CEQA Review and Public Comment, and Resulting Legal Exposures.

Rescission of Resolution 17-02, and approval of Alternative 1, will require CEQA compliance strategies that create time-consuming delays and legal exposures. The Board should not wait to evaluate those consequences after it has given staff directions to commence that process, as recommended by the current staff report. It should instead consider those consequences now, as part of the present deliberations.

Subsequent CEQA compliances will entail substantial public review and comment on modifications to the EIR, and response to such public comments. These time consuming processes will be required whether the updated CEQA compliance document is a Subsequent EIR or a Supplement to an EIR. A Subsequent or Supplemental EIR will definitely be required. An EIR Addendum will not suffice.

A Subsequent or Supplemental EIR will definitely be required because rescission Resolution 17-01, and approval of Alternative 1, will necessarily involve new significant environmental impacts not previously contemplated by the approved Project. This is

¹ While Class of One Equal Protection claims do not depend on the existence of government official "vindictive action," "illegitimate animus," or "ill will, those circumstances are an "additional factor" that provides further support for such claims. (See generally concurring opinion of Justice Breyer in *Olech*, *supra*, 528 U.S. at p. 566). Extensive reliance by several Board members on inaccurate information at the votes conducted on January 9, 2019, and reliance on circumstances and conditions not included in the relevant benchmarks, may not be evidence of vindictive action. However, the assertion by some Board members that the benchmarks were not attained, due to circumstances that existed solely based on the uncooperative actions of the state agencies that such Board member's represent, suggests potential animus that goes beyond simple irrational and arbitrary conduct.

evidenced by the fact that the certified EIR confirms that Alternative 1 can only be implemented if a Statement of Overriding Considerations is adopted. The existing EIR therefore confirms that Alternative 1 will involve new significant environmental impacts that were avoided by the existing Project. A change to an approved Project that results in such consequences triggers the public review and comment procedures mandated for a Subsequent or Supplemental EIR. Other potential impacts arising from the change in the Project and the circumstances under which it is being undertaken, will likely also need to be evaluated, with public input.

In addition, any Statement of Overriding Considerations raises significant legal issues where it is intended to support a Project amendment that creates a new unmitigated environmental impact. That circumstance is complicated where, as here, the Board previously confirmed a feasible Project alternative that avoided that newly arising unmitigated environmental impact.

b. The Proposed De Facto Amendment To Delete Alternative 5B and Pursue The Core Project Without Further CEQA Evaluations Is Not Appropriate.

The Staff Report suggests that the Board could amend the approved Project to delete implementation of Alternative 5B, in a fashion that avoids a discretionary action that entails further CEQA evaluations. No legal authorities are cited for the claim that the proposal to delay an element of the approved Project is not a discretionary action. That circumstance might exist where the delay is intended to facilitate prioritization of Project resources, provided the delay does not entail a phasing that would result in additional environmental impacts. However, the record in this manner is clear that the directed delay that is recommended is intended to facilitate pursuing other proposals for alternative public accesses other than 5B. It is therefore not simply a prioritization of resources. It is a de facto amendment to the adopted Project to reduce its scope to the core elements and remove the 5B access and parking.

Such a de facto amendment to the approved Project will require CEQA compliances and will involve new significant environmental impacts not previously contemplated by the approved Project. Substantial evidence supporting the environmental impacts that will arise if the Project is amended to delete the intended 5B access and parking is detailed in Section 2 of my enclosed September 12, 2017 letter and in Section 6 of my enclosed April 13, 2017 letter.

c. Any Proposal to Reinitiate Consideration of Alternative 5 Will Entail Significant Environmental Risks and Legal Liabilities.

Though not explicitly detailed in the Staff Report, both the Agenda notice, and the final paragraph of that Staff Report, implicates the potential that the Board may reconsider its prior decision to drop further consideration of Alternative 5. Because of the ambiguities of those materials, we are compelled to address the possible legal and

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environmental consequences of Alternative 5. For that reason, we included copies of our prior letters that address the impacts and legal exposures that Alternative 5 would entail.

The legal exposures arising from any reconsideration to pursue Alternative 5 are detailed in Sections 1(b), 1(c), 1(e), 4, and 5 of the enclosed April 13, 2017 letter. Among the critical issues detailed in Section 1(c) are the damages and hazards that will arise if any amended Project impacts the Pinedale Dump. The Pinedale Dump includes organic domestic garbage waste that generates hazardous methane gases. If that dump is impacted by an amended Project it will likely causes the release of methane gases. That circumstance will result in inverse condemnation liabilities for the Conservancy if that condition impacts uses of my client's property. Substantial evidence concerning the existence and potential harms associated with such methane gases in the former Pinedale Dump are further detailed in the Post Closure Land Use Plan, December 13, 2018, included as Attachment B to the January 9, 2018 staff report.

4. The Published Agenda Provides the Public Ineffective Notice Because It States an Unduly Wide Range of Possible Actions on an Unduly Wide Range of Possible Alternatives. Such Notice Violates the Public's Rights to Be Adequately Advised of Intended Board Deliberations Sufficient For the Public To Protect Their Vital Interests.

We appreciate that the staff is struggling to facilitate a discussion with the Board to determine what Project options may, at this time, garner a support of a majority of the Board. However, there are practical and legal limits on the ability of the Board, at this stage in the process, to initiate a reconsideration of a full panoply of alternatives detailed in the certified EIR. However, reconsideration of an unreasonably broad potential range of alternatives seems intended based upon the public notice provided in the published Agenda.

The Bagley-Keene Open Meeting Act requires state agencies to publish agendas that include a statement of a specific agenda item. The Ralph M. Brown Act requires that local agency agendas provide a brief general description of each item of business to be transacted or discussed at the meeting. These provisions are intended provide the public with sufficient detail as to the scope of matters the agency intends to deliberate. This assures that a member of the public knows whether an issue vitally affecting his or her interests is to be heard. (See generally, *San Diegans for Open Government v. City of Oceanside* (2016) 4 Cal.App.5th 637; *Carlson v. Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196, 200; 67 Ops.Cal.Atty.Gen. 84 (1984)).

The February 27, 2019 Agenda includes the statement that the Board may "pursue a different direction for the Project, including considering other Project alternatives". This Agenda item provides a vague notion of potential deliberations that will be conducted. No member of the public could reasonably discern whether a potential

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alternative that may be deliberated relates to an issue that vitally affects his or her interests.

This problem is compounded by the fact that members of the public are required by law to detail to the Board the substance of legal claims that may be raised by the Board decisions on the Project. Such a broadly stated agenda item makes it impossible for a member of the public to focus comments and assure compliance with their remedy exhaustion obligations where there is an unreasonable number of potential actions.

The uncertainties concerning the potential actions and deliberations that might be conducted under the rubric of the published Agenda is compounded by the fact that the last paragraph of the February 27, 2019 staff report suggests that there is a potential ability to take action on a wide number of alternatives without having to conduct any further CEQA compliances. As a result, my client has been compelled to reiterate the prior issues that were raised concerning all Project options that were previously deliberated and rejected. It also compelled that we identify the substantial evidence that requires a Subsequent or Supplemental EIR prior to pursuing any such alternatives, which were detailed in Section 3 above.

The structure and content of the EIR previously certified for the approved Project is a further hindrance to well informed public participation in these matters. That EIR incorporated a wide range of alternatives, without a clearly delineated preferred option. It set forth a multitude of alternatives that were developed as a menu of options that might be incorporated into the Project's finally adopted design, rather than as options that would substantially lessen or avoid the Project's environmental impacts.

That structure of the certified EIR was confirmed to be legally inappropriate in *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277. The *Washoe Meadows* court held that such an EIR structure violates CEQA because it denies the public the opportunity to have a CEQA document that was based on an "accurate, finite, and stable" Project description. This is further detailed in my enclosed December 11, 2017 letter.

Any proposal to now further deliberate a broad menu of options, on the basis that they were among those detailed in the certified EIR, recommit the violation of the public's right to participate in a dialogue of environmental impacts that is based on an accurate, finite, and stable" Project description.

The Conservancy legal counsel may attempt to avoid the legal accountability for the flawed structure of the certified EIR, on the basis that the time for bringing legal challenges has passed. However, that inappropriate menu of options is now being used to inform further deliberations, even though the use of the menu of options approach is a core aspect of the certified EIR's legal infirmities. Those legal infirmities were previously not litigated simply because of the satisfactory nature of the project option



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that was adopted. However, there is great legal exposure if that adopted Project alternative is reconsidered, and the deliberations and determinations supporting that reconsideration rely significantly on elements of the certified EIR that are demonstrably legally infirm.

5. Conclusion.

Any action by the Board to modify the existing adopted Project is fraught with time delays and legal challenges. Further, the potential to conduct deliberations of such matters by attempting to reopen the full panoply of prior evaluated alternatives (or other possible alternatives) creates a process that frustrates legitimate public participation and proper environmental evaluations.

These impacts to the timely implementation of an effective Project are unnecessary. The Board presently owes a clear ministerial duty to pursue implementation of all elements of Resolution 17-01, including certification that the relevant benchmarks were all timely satisfied. This does not require that the Board affirmatively vote to direct staff to proceed to implement Alternative 5B. It simply requires that the Board acknowledge and accept the staff's prior determinations that the benchmarks required in Resolution 17-02 were timely obtained, which the evidence in the record fully supports.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP



Jeffrey M. Reid

enc. December 11, 2017 Letter /wo enc.
September 12, 2017 Letter /wo enc.
June 6, 2017 Letter /wo enc.
April 13, 2017 Letter /wo enc.

cc: Cliff Tutelian



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December 11, 2017

Email to Melinda.Marks@sjrc.ca.gov

Melinda Marks, Executive Officer
San Joaquin River Conservancy
5469 E. Olive
Fresno CA 93727

**Re: ENVIRONMENTAL IMPACT REPORT
AND PROJECT APPROVAL FINDINGS
FOR THE SAN JOAQUIN RIVER CONSERVANCY
RIVER WEST FRESNO EATON TRAIL EXTENSION PROJECT
State Clearing House # 2014061017**

Dear Ms. Marks:

This letter is provided on behalf of my clients Cliff Tutelian and Tutelian & Co., Inc., who own interests in properties near the proposed San Joaquin River Conservancy River West Fresno Eaton Trail Extension Project (the "Project"). Please ensure this letter is included in the Record of Proceedings regarding the consideration of the Project by the San Joaquin River Conservancy (the "Conservancy"). Please also provide it to all Board Members at, or prior to, the December 13, 2017 meeting for the further Project deliberations.

The purpose of this letter is to encourage your Board to prepare a Subsequent EIR or Revised EIR, to address inadequacies in the analysis conducted in the certified EIR. This will be a valuable tool to help avoid having the Conservancy becoming embroiled in CEQA litigation that could otherwise be avoided.

The inadequacy of the certified EIR is highlighted by the recent decision issued by the First Appellate District in the matter of *Washoe Meadows Community v. Department of Parks and Recreation* (2017 WL 5476487). The case involved an agency that developed an EIR that incorporated a number of project alternatives. Those alternatives were not developed or evaluated as options that would substantially lessen or avoid the project's environmental impacts. They were instead developed as a menu of options that might be incorporated into the Project's finally adopted design. The Court held that this approach violated CEQA because it denied the public the opportunity to have a CEQA document that was based on an "accurate, finite, and stable" project description.

The EIR certified by the Conservancy for the Project commits the same CEQA violation. It evaluated a range of "Action Alternatives" intended to provide a menu of options that that might be incorporated into the Project's finally adopted design. The EIR confirmed that none of those Alternatives (other than the No Project Alternative) served to lessen or avoid the Project's environmental impacts. The "Action Alternatives" were therefore not incorporated to implement CEQA's alternatives analysis requirement.

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The Administrative Record confirms that the Project described in the Project Description in the EIR was not the intended "preferred project". That is evidenced by the process that is being conducted to offer the Conservancy a menu of "Action Alternatives". This "range of alternatives" approach does not result in a stable proposed project.

Washoe Meadows Community v. Department of Parks and Recreation (2017 WL 5476487) confirms that when an agency develops a CEQA document that lacks a stable and defined project, it is putting the cart before the horse. The problems with this approach that was adopted by the EIR, is highlighted by the present struggles the Conservancy is suffering in deciding which of the various menus of Project options that it desires to incorporate as the Project. The appropriate approach would have been to have the Conservancy Board focus on what project that it wanted to implement that achieved all of its intended objectives. The deliberations over which of various project alternatives the Board wished to have evaluated under CEQA should have been determined through a scoping process conducted pursuant to Guidelines Section 15083. Incorporating a menu approach into the EIR is not legally permissible.

We are now in the unique circumstance where your Conservancy has certified an EIR while it is still deliberating the issue of what actual Project it intends to pursue. In conducting that evaluation process, your staff report, and other new evaluations, are being placed into the record of proceedings. These evaluations are developing and providing new information concerning significant environmental impacts, and relevant mitigation measures, that was not previously available.

This new information includes the further details in the Staff Report concerning the need, difficulty, and uncertainty, in providing funding for maintenance. That maintenance funding is required, in part, to avoid the blighting environmental impacts to adjoining property owners that a Project that lacks such funding would create.

New information is also being provided about strategies or conditions for adding a traffic light, and the fact that implementing such a mitigation measure would violate existing General Plans, and the resulting intention to adopt a statement of overriding considerations concerning that matter. The Project that was presumably intended by the Certified EIR did not identify any Project Impacts, Mitigation Measures, or Statements of Overriding considerations concerning such matters. The Staff report details a number of other additional environmental impacts of Project.

When substantial changes are proposed in a project, a Subsequent or Supplemental EIR is required (Public Resources Code Section 21166(a)). CEQA Guidelines Section 15162(a)(1) further details that further EIR preparation is required where a change in the project is substantial.

Melinda Marks, Executive Officer
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In this instance, the actual Project has not yet been determined. It is therefore uncertain what menu of options respecting the Project are to be considered when evaluating whether a substantial change is being made to the Project. However, some stable and defined Project must certainly have been intended when the EIR was certified (though it was in fact required well before then). The law will likely presume that the Project, as intended by the certified EIR, is the base Project described in the Project Description of the EIR. In that case, if any Action Alternatives are now incorporated into the Project, that will result in a modification of the Project. Any such modification to the Project is clearly a substantial change because the EIR confirms that any such Action Alternative will increase the environmental impacts beyond those resulting from the base Project.

The Conservancy cannot resolve this quandary it created, and claim no substantial change in the Project is now being proposed, by simply asserting that the EIR evaluated all of the environmental impacts of all the various menus of the Project's options. That approach attempts to avoid the legal requirements of evaluating a change in project by failing to have previously provided an adopted stable and finite project description. That is inconsistent with the standards imposed by CEQA and the Guidelines. That claim would further be an admission that the Project evaluated by the EIR lacked the project stability that *Washoe Meadows Community v. Department of Parks and Recreation* (and the cases cited therein) requires.

If the Conservancy is going to move forward with a Project approval, it needs to assume that Project supported by the Certified EIR was the Project described in the Project Description. To the extent that Project is being revised by deliberations to incorporate any "Action Alternative", the Conservancy needs to prepare an appropriate Subsequent EIR to evaluate the impacts of that revised Project, for further public review and comment, before it approves the revised Project.

Alternatively, the Conservancy should simply admit it violated CEQA in using the menu approach in the Project description. It should prepare a further Revised EIR that takes into account the deliberations conducted by the Conservancy concerning what project it actually desires to implement. It should then provide the public the benefit of a stable and defined project for deliberation in the CEQA process.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP



Jeffrey M. Reid

cc: Mr. Cliff Tutelian
San Joaquin River Conservancy Board Members
Mr. Michael Crow, Esq., Deputy Attorney General



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September 12, 2017

Email to Melinda.Marks@sjrc.ca.gov

Melinda Marks, Executive Officer
San Joaquin River Conservancy
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**Re: PARTIALLY REVISED DRAFT ENVIRONMENTAL IMPACT REPORT
FOR THE SAN JOAQUIN RIVER CONSERVANCY
RIVER WEST FRESNO EATON TRAIL EXTENSION PROJECT
State Clearing House # 2014061017**

Dear Ms. Marks:

This letter is issued on behalf of my clients Cliff Tutelian and Tutelian & Co., Inc., who own interests in properties near the proposed San Joaquin River Conservancy River West Fresno Eaton Trail Extension Project (the "Project").

This is a comment letter concerning the Partially Revised Draft Environmental Impact Report ("RDEIR") for the Project. Please ensure this letter and its enclosures are included in the Record of Proceedings regarding the consideration of the Project by the San Joaquin River Conservancy (the "Conservancy"). This letter is a supplement to the Comment Letter I provided regarding the Project and the initial Draft EIR ("DEIR") on April 13, 2017.

1. The Conservancy is Not Exempt From Local Government Regulation or Land Use Plans.

The RDEIR, at Section 3.11, p. 3-2, states that the Conservancy is not subject to local government planning and regulation. Similar statements regarding the Conservancy's supposed exemption from local government land use planning are stated at Section 3.11, p. 3-6 and Section 5.6.11 at page 5-6.

The statement at page 3-2 suggests that the Conservancy believes it is exempt from all aspects of local government regulation. However, that is not a correct statement of the law. Government Code Sections 53090 and 53091 confirm that state agencies (such as the Conservancy) that exist for the local performance of governmental or proprietary functions, are obligated to comply with all applicable building and zoning ordinances of the county or city in which the territory of the local agency is situated. (*City of Malibu v. Santa Monica Mountains Conservancy* (2002) 98 Cal.App.4th 1379, 1383.)

In addition, the RDEIR's assertion that the Conservancy is exempt from local government land use regulations (i.e. General Plan documents) is also inaccurate. The San Joaquin Conservancy Act, at Public Resources Code Section 32514, specifically provides that "all zoning or land use regulations shall remain the

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exclusive authority of the member agencies." If the Conservancy could simply disregard the land use policies of its member agencies, this legislative provision would prove to be illusory. The Conservancy and its project must conform to local land use regulations because Public Resources Code Section 32514 waives any immunity or exemption that the Conservancy might otherwise have to ignore such local land use standards. (*City of Malibu v. Santa Monica Mountains Conservancy*, *supra*, 98 Cal.App.4th at 1384 - 13863.)

The City of Fresno's General Plan is therefore an "applicable" plan under CEQA Guidelines Section 15125(d), despite the RDEIR's repeated assertions to the contrary.

2. Traffic Study Lacks Proper Evaluation Methods.

The RDEIR includes, in Section 3.17, a discussion of a supplemental traffic study to show that the Project's traffic will have less than significant impacts. The problem is that the Traffic Study that this determination is based upon applies a unique and inappropriate approach to its traffic generation assumptions.

The City of Fresno Traffic Impact Study Guidelines incorporate approved methods for determining the traffic counts associated with a project that are to be based upon a project's intended uses.¹ (See Section 7 – Trip Generation.) The City's Guidelines confirm that the Institute of Transportation Engineers (ITE) Trip Generation manual, and the trip generation factors it applies, should be the source for assumed trip generation of a project's uses. For City, County and Regional parks, the ITE Manual relies upon the acreages of the relevant site as the relevant factor for trip generation.²

The Supplemental Traffic Report ignores the City of Fresno's Guidelines, and the ITE Manual's relevant trip generation factors and standards of analysis. The Supplemental Traffic Report treats the Project solely as a "walking trail" and on that basis determines no relevant ITE Trip Generation factors are available. Instead, it relies upon the number of parking spaces in the intended parking lot as the relevant trip generation factor. (RDEIR Appendix EE, p. 3.) This approach, to assume that the intended parking lot is the use factor relevant to traffic demands, violates all standard principles of traffic impact analysis. The Supplemental Parking Study (and its precursor) cite to no other circumstance where the extent of available parking is assumed to be the basis for trip generation.

¹ The Traffic Impact Guidelines are available at <https://www.fresno.gov/publicworks/wp-content/uploads/sites/17/2016/09/TrafficImpactStudyGuidelinesCityofFresnoOctober201.pdf>.

² Relevant Pages of the ITE Trip Generation Manual are enclosed with this letter.

It is unreasonable to support the circular reasoning that the parking demands created by a Project's facilities will be limited by the parking facilities developed on the Project's site, and that the Project will therefore create no impact arising from insufficient parking facilities. This curious analytic approach also results in an ineffective analysis of the impact of traffic at the study intersections and street segments.

The inappropriate traffic generation factors incorporated into the DEIR and RDEIR causes both documents to fail to adequately address the blighting influences of the Project that will arise from the lack of sufficient parking developed for the intended Project (including parking needed to support for the actual uses to be conducted within the environs of the Project). The relevant blighting influences this circumstance will cause are detailed in Section 6 of my prior Comment Letter, which is incorporated by this reference.

This circumstance highlights a fundamental underlying problem with the DEIR and RDEIR. The relevant Project is not sufficiently described to permit effective evaluation of the visitor activities and relevant traffic and parking demands that the programs to be conducted on the Conservancy lands will generate. As a result, the Traffic Studies assumes the project is a mere walking trail. However, the Project description acknowledges that the Conservancy's plans include bikeways, equestrian areas, and facilities for boating and fishing, in addition to "other" educational and recreational uses. Unfortunately, the DEIR and RDEIR provide no description about the facilities that will be developed to support such activities beyond a trail, restrooms, and parking. They also provide no description concerning the programs that will be conducted within the Project environs. The DEIR and RDEIR provide an analysis of infrastructure that is necessary to facilitate certain uses on the site. But they fail to adequately evaluate the impact of such uses beyond evaluating the impact of the development of the intended infrastructure. As a result, the DEIR and RDEIR impermissibly ignore (and underestimate) the blighting influences caused by the inadequacy of parking capacity. They also fail to analyze and address the need for public safety and public property protections that will arise from the generation of public use and activity on Conservancy lands.

3. The RDEIR Includes Incorrect Statements About the Regulatory Framework Governing Environmental Justice Considerations.

My prior Comment Letter detailed why Environmental Justice concerns are not environmental impacts. That conclusion is based on the fact that CEQA is an analysis of environmental impacts, not broader goals of improving health and safety of human beings. This has been confirmed by the California Supreme Court in *California Bld. Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.App.4th 369, 386-387. The DEIR's misapplications of Environmental Justice concerns cause the document to violate CEQA's informational requirements. It is also used to incorporate revisions to the Project Description, which creates a

misleading analysis of Project impacts. Edits made by the RDEIR do not remedy those defects.

The RDEIR cites statements in the California Attorney General's Fact Sheet titled "Environmental Justice at the Local and Regional Level – Legal Background", which was last updated July 10, 2012 (the "Fact Sheet"). Statements in the Fact Sheet regarding the consideration of the environmental impact of a project on human beings, which are quoted by the RDEIR at page 4-2, are inconsistent with the California Supreme Court decision cited above. To be fair to the Attorney General's Office, the Fact Sheet was issued several years before the above cited Supreme Court decision. However, that does not excuse the RDEIR's use of incorrect statements of law in its discussion of the Regulatory Framework that governs how CEQA should address Environmental Justice factors.

The Fact Sheet confirms that Environmental Justice concerns may be consistent with an EIR's evaluation of whether a project's environmental impact affects sensitive receptors to pollution. It also references the role of social and economic impacts under CEQA and how those must be tied to environmental impacts. It further references the obligation of an EIR to evaluate Alternatives and consider Mitigations to substantially lessen or avoid significant environmental impacts. All of these are proper descriptions of CEQA standards.

However, this RDEIR misapplies CEQA in its treatment of Environmental Justice considerations by continuing the DEIR's use of Environmental Justice considerations that are disconnected from an environmental impact of the Project. That approach is not endorsed by the Fact Sheet. That misapplication results in the DEIR's inclusion of Alternative 5 to address Environmental Justice considerations, even though the DEIR confirms that there is no category of environmental impacts that Alternative 5 will avoid or substantially lessen. Alternative 5 actually causes greater impacts on hazards and hazardous materials than the envisioned Project. The RDEIR's addition of quotes from the Fact Sheet does not remedy this violation of CEQA, because it misapplies the lawful standards that the Fact Sheet describes.

The RDEIR incorrectly asserts that CEQA provides agencies wide latitude to consider social and economic consequences of a project "in whatever manner the agency deems appropriate", and cites CEQA Guidelines Section 15131 as support for this claim. (RDEIR at page 4-4). CEQA Guidelines Section 15131 actually says that "Economic or social information may be included in an EIR or may be presented in whatever form the agency desires". (emphasis added). Presentation of information is not the same as consideration and evaluation of impacts. Section 15131 actually expressly limits the manner in which the agency may consider the economic and social consequences of a project, by confirming that such effects shall not be treated as significant effects on the environment. The RDEIR's misstatement of the CEQA standards is a further misguided attempt by the RDEIR to support the DEIR's

misapplication of Environmental Justice matters to manufacture a legally unsupported justification for including Alternative 5 into the DEIR.

The RDEIR further misstates (and makes up) relevant regulatory standards in its discussion of the standards for an Alternatives Analysis, in Section 5.2 of the RDEIR at page 5-2. The RDEIR states: "The following are key provisions of the State of CEQA Guidelines (Section 15126.6)". It then includes several bulleted items, the last of which is the following:

"Although the focus of the alternatives analysis should be on alternatives that reduce or avoid environmental impacts, an EIR may also present alternatives that provide greater project benefits at increased environmental cost, which helps highlight the public trade-offs in consideration of the project and alternatives to it."

The above language is presented in the RDEIR as a provision of CEQA Guidelines, though it is not. This language is not included in CEQA Guidelines Section 15126.6, or any other CEQA Guidelines, CEQA Statutes, or CEQA decisional case law. This language was not previously included in Section 5.2 of the DEIR. It was inserted into Section 5.2 of the RDEIR on the claim that it was revising Section 5.2 for "context and readability". (RDEIR at Page 5-1) Instead, this revision inserts an entirely made up precept of law that has as its purpose a further effort to defend the DEIR's misapplication of Environmental Justice matters in an attempt to justify including Alternative 5 into the DEIR.

Portions of the RDEIR do correctly apply CEQA standards when determining whether any Environmental Justice considerations would justify the incorporation of mitigations or the consideration of alternatives to lessen or avoid relevant environmental impacts. Specifically, Section 4-4 confirms that the project does not have the potential to result in disproportionately high adverse environmental effect on disadvantaged communities. This analysis and conclusion highlights the inappropriateness of including Alternative 5 in the DEIR.

Alternative 5 does not lessen or avoid any environmental impact of the Project. This includes environmental impacts that may be associated with Environmental Justice factors. Alternative 5's inclusion in the Alternatives Analysis is therefore entirely inappropriate, and is simply used as a device to incorporate an "add alternate" that effectively amends and supplants the Project Description, in violation of CEQA. The legally inaccurate statements regarding the regulatory framework for Environmental Justice factors and Alternative Analysis in the RDEIR also violate CEQA's informational standards applicable to the RDEIR.

4. The EIR Requires Revisions to Assure a Proper Project Description and Appropriate Public Information Disclosures, Which Impose a Duty to Further Revise and Recirculate a Further Revised DEIR for Further Public Review.

As detailed above, the RDEIR violates important CEQA standards. Addressing those requirements will involve substantial revisions to the RDEIR document. Public Resources Code Section 21092.1 provides that when a lead agency adds "significant new information" to an EIR after completion of consultation with other agencies and the public but before certifying the EIR, the lead agency must pursue an additional round of consultation." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, at p. 447). New information is "significant" where "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, at p. 1129; accord, CEQA Guidelines Section 15088.5(a)). It is clear that the revisions required to the RDEIR will involve disclosure of significant new information that will require recirculation for further public review and comment.

In conducting the required revisions and recirculation, the Conservancy should set forth a Project Description that incorporates a properly detailed description of the programs and activities that will be conducted on the Conservancy lands. A project description that omits these details results in an EIR that evaluates only the impacts of installing a few elements of infrastructure. It thereby fails to evaluate the environmental impacts resulting from the conduct of the public that will be drawn to the site as a result of the infrastructure and the expanded public access that the stated Project invites, but does not limit or otherwise manage.

The lack of a proper project description denies the City the opportunity to have appropriate analysis of the traffic and parking demands resulting from the Project's uses. It also denies the City the opportunity to evaluate the public safety resources that must be committed to assure both safety of the users, and protection of adjacent private property. Without the evaluation and commitment of those needed resources the Conservancy risks violating Public Resources Code Section 32511, which requires the Conservancy to close to the public any lands or facilities that it is not able to maintain for public health and wildlife protection, or to adequately protect the rights of adjacent owners from the public. A properly stated Project Description would also incorporate a reference to Public Resources Code Section 32511 as a relevant regulatory framework within which the Project and its impacts should be evaluated.

Melinda Marks, Executive Officer
San Joaquin River Conservancy
September 12, 2017
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We look forward to the opportunity to comment on further recirculated RDEIR materials.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP



Jeffrey M. Reid

cc: Mr. Clifford H. Tutelian
San Joaquin River Conservancy Board Members
Mr. Michael Crow, Esq., Deputy Attorney General

Enc. Excerpts of ITE Trip Generation Manual,
Land Use Categories 411, 412 and 417



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June 6, 2017

Email to Melinda.Marks@sjrc.ca.gov

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**Re: DRAFT ENVIRONMENTAL IMPACT REPORT FOR THE SAN
JOAQUIN RIVER CONSERVANCY RIVER WEST FRESNO EATON TRAIL
EXTENSION PROJECT (State Clearing House # 2014061017)**

Dear Ms. Marks:

Please include this letter in the record of proceedings for the above referenced Project. Please also distribute a copy of this correspondence to all of the Conservancy Board members so that it is available to them as part of their deliberations on June 7, 2016 regarding Agenda Item G-1.

I have twice previously written to you regarding the above referenced Project. I provided a Comment Letter to the Draft EIR dated April 13, 2017. Among other items, that Comment Letter focused on the inadequacy of the Alternatives Analysis of the EIR, and the need to properly evaluate Routes 5a, 5b and 5c described in that Alternatives Analysis. I also wrote to you on May 8, 2017, detailing my disappointment about not having received notice of the Conservancy Board Meeting held on May 3, 2017, where it deliberated and acted upon a proposal by the City of Fresno to augment the analysis of Route 5b (consistent with recommendations of my Comment Letter).

Because I did not receive notice of the May 3, 2017 agenda matter, I was not able to attend that Board meeting and provide further support and explanation as to why the recommended augmented analysis is an important effort to avoid potential CEQA litigation and Project delays.

I understand from your Board's Agenda for its June 7, 2017 meeting that there is to be a further report and possible deliberations regarding the augmented analysis authorized at the May 3, 2017 meeting. I am also aware of an apparent organized media campaign likely being used to pressure the Conservancy Board members to short circuit the further analysis that was authorized at the May 3, 2017 meeting.

The purpose of this letter is to respond to several factual inaccuracies and false impressions promoted by the media campaign. I also wish to reinforce the importance of conducting the augmented analysis.

1. Public Access to the River Currently Exists. Last Sunday's Fresno Bee featured a front-page editorial authored by Marek Warszawski. The premise of that editorial was the false assertion that no public access currently exists to the San

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San Joaquin River Conservancy
June 6, 2017
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Joaquin River in the environs that encompass the intended San Joaquin River Parkway. In fact, four such public access points presently exist, at Wildwood Native Park, at the Thomas MacMichael Sr. Loop Trail, at Palm and Nees Avenues, and at Riverbottom Park. There are probably others I have not listed.

This is not to suggest that there is not a need and urgency to improve further access to the river in the area between Highway 41 and Nees Avenue. However, the Fresno Bee falsely represented to the community that no public river access along the San Joaquin River Parkway presently exists.

2. The Proposed Project Will Lead to Termination of Existing River Bottom Access Rights. The Warszawski editorial referenced accessing the river bottom by driving vehicles over a toppled fence behind a shopping center. The editorial also referenced this as an existing access road that the EIR recommended and vetted in detail.

What the editorial did not mention is that the Project, as being proposed for adoption, would actually abolish all existing public rights to access the river along that existing access road. That circumstance is detailed in my April 13, 2017 Comment Letter. If that circumstance is not understood and addressed, the public's interests in achieving enhanced river bottom access will be adversely impacted.

3. The Alternative 5 Route and Related Options Were Not Properly Evaluated in the DEIR. The Warszawski editorial stated that the alternative access road that the City of Fresno recommended for study was scrutinized in the draft EIR. My Comment Letter details the glaring errors, cursory analysis, and inconsistent standards that the EIR studies relied upon regarding the Alternative 5 analysis. Perhaps Mr. Warszawski did not have the opportunity to receive and review my Comment Letter or the comment letters submitted by other members of the public regarding the DEIR. Perhaps your Board has not yet been provided that opportunity either. Nevertheless, proper journalism should compel an evaluation of those matters before asserting facts that are so easily disproven. Your Board should also evaluate those Comment Letters as part of any further deliberation of the augmented study.

4. Significant Geotechnical Constraints Burden the Alternative 5 Access Proposal. The Warszawski editorial suggested that the route option that the City recommended for augmented study was infeasible, in part, because of the need to negotiate the vicinity of a questionable landfill. In fact, the relevant DEIR study concluded that the Geotechnical Constraints that exist for the alternative that Warszawski endorses are the same as exist for the Route 5b option that he denigrates. This includes issues of the potential violation of the Bluff Protection Overlay District, the instability of the slope, and the contribution of the slope instability caused by existing historic landfills. More specifically, with respect to Alternative 5, the relevant feasibility study states:

The existing Gravel Haul Road would need to be widened by cutting into the bluff, which is composed of unconsolidated fill material containing organic wastes. Engineered retaining walls would be necessary to attempt to stabilize the slope. Additional geological investigation of this route would be needed. The route would conflict with grading standards as described in Article 14 of the Bluff Protection Overlay District (City of Fresno 2015). The slope along the toe of the bluff is unstable due to past landfilling activities. A mechanical structure, such as a concrete retaining wall or a reinforced earth structure, would be required along the portion of the route proposed along the toes of the bluff slope.

These development standards and constraints for Alternative 5 do not appear more burdensome than Route 5b's requirement of addition of fill and adding pillar supports to the road that the editorial referenced.

In addition, the Alternative route that Warszawski endorses follows an alignment that runs through the former Pinedale Dump, and incorporates a parking lot at location that is near the border of the Former Pinedale Dump and a Construction and Demolition Waste Site. By contrast, the roadway for Route 5b is actually along an alignment that avoids the former Pinedale Dump. In addition, the zigzag alignment for Route 5b will actually improve slope stability in these environs.

5. There Is No Cost Information For Any of the Route Options – Notwithstanding Mr. Warszawski's Conjectures. Mr. Warszawski asserts that the 5b Route "would almost certainly be the most expensive option". This unsupported statement does highlight an important element wherein the DEIR fails to achieve its public informational purposes. There is no information about the relevant costs of any of the route options.

We do know, however, that Route 5b will not require the exercise of condemnation powers. It therefore will not entail the substantial payments for severance damages that will be part of the Project costs if Alternative 5 is pursued. Understanding the potential costs of Route 5b (and any other potential route) is important information to develop. However, similar study and evaluation of the costs of the Alternative 5 option, including the costs of condemnation litigation and compensation, must also be part of any comparative analysis.

6. The Augmented Analysis Will Expedite Certification of a Compliant EIR, Not Delay It. The Warszawski editorial suggested that, if there had not been a proposal to conduct the augmented study requested by the City of Fresno, the Draft EIR was otherwise sufficiently completed that it could be certified at tomorrow's Conservancy Board meeting. On that basis, the editorial quotes and endorses statements that assert that the augmented study is simply a needless delaying tactic to

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create a diversion to supposedly advantage politically connected community members.

In fact, there is nothing needless in providing the City of Fresno proper deference and support when it raises issues and concerns about the design of vehicular access from its public streets into the Project environs. Failure of your Board to consider the City's policy goals would simply create potential conflicts and constraints in achieving the important Project goals. The Alternatives analysis of the various routes was based, to a large extent, on a flawed and cursory inventory of relevant City policies for such roadways. The City's request that your Board take the time to do a proper study is not a diversion. Supporting that request is essential for effective CEQA evaluations and regional government collaboration.

Furthermore, the Warszawski editorial is simply wrong when it suggests that, without the augmented study, the EIR would otherwise be ready for certification. In fact, no responses to the various Comment Letters have yet been circulated to the public. Further, as detailed in my Comment Letter, there are fatal structural defects in that DEIR that will necessitate recirculated materials that have not yet been prepared, if successful legal challenge is to be avoided. In these circumstances, taking the time to complete an augmented study of Route 5b is the best means of timely completing the CEQA evaluations so that the EIR can support the intended project development. Slandering those that pursue effective public policy while fostering conspiracy theories really does not serve our community well.

7. The Conservancy Board's Need to Address Public Safety At the River Bottom Is Being Ignored. The Warszawski editorial referred to the tragic drowning of Neng Tha, and stated that the lack of improved access was a potential contributing factor. I agree. But improved public access is not enough to improve public safety.

However, to the extent public access is part of the public safety solution, the Conservancy owes the public some more specifics about the programs that it intends to operate and manage in the Parkway lands. We are told there are plans for horse riding, bicycling, and fishing. But we are not advised as to the extent of such operations or the extent of demand for public safety services those activities are estimated to create.

The Conservancy Board has also nowhere indicated how it intends to adequately address other aspects of the public safety. Will Fish and Wildlife wardens help monitor the public? Will County Sheriff or City Policy officers cruise the river and monitor the public? Other City's that have rivers running through them provide resources to address such matters.

In his editorial, Mr. Warszawski also noted that he saw heaps of trash and signs of other environmental damage to areas of the river bottom where public access is

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currently provided. Yet, the Conservancy Board has offered the public no program or assurances about how such nuisance activities will be avoided or abated.

The San Joaquin Conservancy Act clearly states that "The conservancy shall close to the public any lands or facilities which it is unable to maintain in a clean and safe manner and to adequately protect the wildlife and rights of adjacent property owners from the public..." (Public Resources Code Section 32511)

Unfortunately, as part of the deliberation of access routes and parking lot areas that the Conservancy is conducting, it is providing the public no analysis or information about how it intends to assure its statutory obligations of protecting public safety, wildlife, and property rights. It would be a tremendous aggravation and disservice to the community if so much money and effort were expended to establish public access, only to be required to later close such access because of the Conservancy's duties to abide by Public Resource Code Section 32511.

8. Your Board Should Act With Stewardship – And Not Blustered By Our Local Media's Agenda. In the past, our community has lost many opportunities for significant amenities because of hasty and ill-considered approaches. We have also expended great sums on many white elephants that our local media championed, though they hold no public accountability for their poor judgments.

Turning important public deliberations into mean spirited political attacks is something our community media does well. However, it does not do us any good. Our local newspaper's present effort to short circuit proper public deliberations and analysis should be rejected, despite their front-page editorials. I therefore urge you to stay the course in conducting an adequate evaluation of Route 5b.

At the same time, the Conservancy must begin to inform the public about how it intends to more fully operate and manage the Project properties that it intends to develop. A "nice, big, contiguous regional gathering place for people who like the outdoors" requires managerial capacities and resources to protect the public and environment. Platitudes and vision statements are inadequate for that task.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP


Jeffrey M. Reid

cc: Mr. Cliff Tutelian
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April 13, 2017

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**Re: DRAFT ENVIRONMENTAL IMPACT REPORT
FOR THE SAN JOAQUIN RIVER CONSERVANCY
RIVER WEST FRESNO EATON TRAIL EXTENSION PROJECT
State Clearing House # 2014061017**

Dear Ms. Marks:

This letter is issued on behalf of my clients Cliff Tutelian and Tutelian & Co., Inc., who own interests in properties near the proposed San Joaquin River Conservancy River West Fresno Eaton Trail Extension Project (the "Project").

This is a comment letter concerning the Draft Environmental Impact Report ("DEIR") for the Project. Please ensure this letter and its referenced enclosures are included in the Record of Proceedings regarding the consideration of the Project by the San Joaquin River Conservancy (the "Conservancy").

1. The Alternative 5 Options Analysis Fails CEQA Informational Standards.

The manner in which the DEIR incorporates the analysis of its recommended Alternative 5 is a severe violation of CEQA. Those issues are detailed in items 2 through 3 below. However, even if Alternative 5 was validly incorporated into the DEIR, the analysis of the various Alternative 5 options that it relies upon is incomplete and misleading, and thereby separately violates CEQA standards. That faulty analysis of the feasibility of Alternative 5 and its variants is forth in Appendix I, Road Feasibility Report (the "RFR") and is substantially relied upon in Chapter V of the DEIR.¹

a. The DEIR Relies on Incomplete, Inconsistent, and Potentially Inaccurate Analysis of Emergency Vehicle Requirements.

Regarding Emergency Vehicle Requirements, the RFR includes a discussion of Fire Industry Bulletin 2016-004 and Fresno Fire Department ("FFD") Development Policies Section 401 to 409. Fire Industry Bulletin 2016-004 is

¹ The DEIR and Road Feasibility Report confusingly use different labels for the options analyzed. The DEIR Alternative 5 is labeled Route 5d in the Road Feasibility Report. The DEIR Alternatives analysis and the Road Feasibility Report are consistent in the labels for Route 5a, 5b and 5c. The Road Feasibility Report includes an option Route 5e that the DEIR disregards. This letter uses the labels applied to the Route options in the DEIR Alternatives analysis.

Melinda Marks, Executive Officer
San Joaquin River Conservancy
April 13, 2017
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enclosed as Exhibit 1. It makes no reference to any of the stated standards. Regarding FFD Development Policies 401 to 409, only FFD Development Policy Section 403.022 is relevant to the site access standards issues. That Policy is enclosed as Exhibit 2.

The analysis the RFR conducts emphasizes three aspects of the relevant policy. These include a requirement that an emergency vehicle access route: (a) not have longer than a 450 maximum length for a single access point; (b) not have more than a 10% grade; and, (c) emergency vehicle only vehicle access shall have a minimum of 20 feet of clear drive width.²

The RFR's reference to a 450 maximum length of access is based on statement (b) at item 5 of Policy Section 403.022, under the heading "Turnarounds". The last sentence of that standard, which is focused on turnarounds, states that a maximum length of a single point of access shall be 450 feet.

However, Policy 403.022, at item 2, under the heading "Points of Access", at subsection (b), provides that a building or exterior storage area lot with up to 650 feet in length may have a single point of access if it has approved turnarounds that comply with the policy. This discrepancy between item 5(b) and item 2(b) in Policy 403.022 is nowhere referenced in the RFR or DEIR. It is evidence of a potential opportunity for a route to have a 650-foot single point of access with a turnaround. However, that opportunity is not referenced in the RFR. Therefore, to the extent the RFR determines that routes are infeasible based on a 450 foot maximum access length, it appears to be inconsistent with Policy 403.022 – Access – 2(b).

This above cited failure of analysis affects the feasibility analysis of Routes 5a and 5b. The error is compounded because none of the descriptions of any of the Routes actually details the length of the access route. That omission makes it impossible for a reader to assess whether a 450-foot or 650-foot length standard is actually violated, the actual length of such route, and whether any required turnaround might be provided.

Regarding the 10% grade policy, the RFR accurately quotes the entirety of the applicable policy, which confirms that the Fire Marshal has authority to approve a route that is in excess of a 10%³. However, in finding that Routes 5a and 5b violate the standard, the RFR makes no reference to the opportunity to obtain a Fire Marshal variance. In addition, because the RFR's description of the routes fails to detail the actual maximum grade of any of the routes, it provides the reader no opportunity to

² See analysis of Route 5a at RFR 3.1.1, which emphasizes violation of the 10% grade and the 450 length requirement, as well as the analysis of Route 5b at RFR 3.2.1 which emphasizes violation of the 10% grade, the 450 length requirement, and the 20 foot clear drive width requirement.

³ The 10% grade policy is quoted at RFR page 2-1, under heading 2.1.

consider the extent to which the 10% grade standard is violated by each such route, or the opportunity to thereby have such route obtain the benefits of the potential Fire Marshal variance. Therefore, to the extent the RFR determines that routes are infeasible based on violation of a 10% grade standard, it disregards the opportunity to obtain Fire Marshal variance from the standards, and fails to incorporate information that provides an assessment of the feasibility of such variance.

Regarding the 20-foot clear drive width standard, Policy 403.022, at item 3(a)⁴, under the heading "Emergency Vehicle Access", establishes a separate requirement for 20-feet in clear drive width.⁵ The RFR's application of this 20-foot clear drive width requirement to the feasibility analysis of the various Routes is inconsistent and possibly inaccurate. For instance, Routes 5b and 5c are both described as a single road with two 15-foot travel lane alignments. Presumably, those two travel lanes are part of a single roadway, which would then comprise a roadway of 30 feet in width. The RFR finds that, with respect to Route 5c, the 20 foot clear drive width requirement is satisfied. However, somewhat inconsistently, the RFR finds that, with respect to Route 5b, the 20 foot clear drive width requirement is not satisfied. In finding that Alternative 5 meets the 20-foot clear drive width requirement, the analysis notes that the existing private road would have to be widened by 5 feet by cutting into the bluff.

A more accurate and consistently applied analysis of FFD Development Policy 403.022 may have concluded that the 650-foot length route with turnaround could be satisfied by Routes 5a and 5b, that the variance from the 10% grade limit could have been reasonably obtained for the benefit of Routes 5a and 5b, and that the 20-foot wide clear drive width requirement is satisfied by the 30 foot wide roads proposed for both Routes 5b and 5c. Under that scenario, none of the five Routes analyzed in the RFR would have violated applicable Emergency Vehicular Requirements. As a result, Alternative 5 may not have been held out as the sole feasible option.

b. The DEIR Relies on an Incomplete and Inconsistent Analysis of Geotechnical Requirements Concerning Alternative 5.

Regarding Geotechnical Requirements, the RFR (which the DEIR relies upon) emphasizes whether the Route complies with the City of Fresno Bluff Protection

⁴ RFR references Policy 403.022, at item 8(a), under the heading "Emergency Vehicle Access", which focuses on standards for an access point that is established as an emergency vehicle only access point. That policy imposes a requirement of 20-feet clear drive width for emergency vehicle only access. However, the access that is being analyzed in the RFR is not intended as emergency vehicle only access. It appears that the intended access is actually governed by Policy 403.022, at item 3(a), under the heading "Emergency Vehicle Access", which establishes a separate requirement for 20-feet in clear drive width.

⁵ Policy 403.022, at item 5, under the heading "Types of Access" appears to require a minimum of 24 feet of clear width for access during construction periods. The RFR and DER do not discuss how or whether this policy will apply or be satisfied.

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Overlay District.⁶ A copy of the complete provisions of the relevant City Ordinances is enclosed as Exhibit 3.

It should first be emphasized that Section 15-104 of the Citywide Development Code provides that the Development Code applies, "to the to the extent permitted by State and Federal law, to all private property within the corporate limits of the City of Fresno, including all uses, structures, and land owned by any person, firm, corporation, or organization." (emphasis added). Therefore, it appears that where a public facility is being developed on public property, the City of Fresno Bluff Protection Overlay District (which is part of the Citywide Development Code) will not apply as a constraint to such a project.

Assuming provisions the Bluff Protection Overlay District does apply, the RFR appears to provide an inaccurate assessment of its constraints. That is because the RFR and DEIR assert that Routes 5a and 5b would conflict with the grading standards in the Bluff Protection Overlay District that prohibits grading or alteration of existing topography or construction of any structure on the bluff face. What is inaccurate is that the DEIR (and table 3-1 of the RFR) make no mention of the fact that Alternative 5 requires cutting into the bluff to widen the existing road by 5 feet. That circumstance is stated in the RFR (at Section 3.4.2), as violating the grading standards. However, that circumstance is nowhere reflected in the actual DEIR or RFR Table 3-1.

In analyzing the various Routes, the RFR declares that, with respect to Route 5a, the slope along the toe of the bluff is unstable because of past landfill activities. With respect to Alternative 5 and Route 5b, it is stated that the ground conditions are unknown and slope instability is possible. For Route 5c, the RFR declares that construction of a road and parking lot on landfill could expose construction worker and members of the public to hazardous materials.

What is apparent is that the Geotechnical Constraints that exist for Alternative 5 is the same as exist for Routes 5a, 5b, or 5c, whether the issue is the potential violation of the Bluff Protection Overlay District, the instability of the slope, or the contribution of the slope instability caused by existing historic landfills. Nevertheless, Table 3-1 of the RFR asserts that Alternative 5 is not constrained by such matters, though it asserts that Routes 5a, 5b, or 5c are constrained.

If the mode of analysis for the Geotechnical Constraints were uniformly applied, the same determinations of constraints would be found for Alternative 5 as for Routes 5a,

⁶ The RFR references standards in Article 14 of the Bluff Protection Overlay District and Section 15-1407 of the Citywide Development Code dated March 31, 20-15. The RFR references are inaccurate. The standards of the Bluff Protection Overlay District are presently set forth in Section 15-1603 of the City of Fresno Citywide Development Code.

5b, or 5c. As a result, Alternative 5 should not have been held out as the sole feasible option.

c. The DEIR Relies on an Incomplete and Inconsistent Analysis of Environmental Constraints Concerning Alternative 5.

With respect to the impacts of landfills in the environs of the Routes and related amenities, the RFR notes, "The specific locations of the various landfills are not known". (RFR, at page 1-6). A conceptual approximation of boundaries is all that is provided. The RFR and DEIR nevertheless attempt to consider the potential impact of those landfills on the various alternative routes, but applies an inconsistent analysis to the issue.

For Routes 5a, 5b and 5c, the RFR emphasizes that a post closure plan may be required because of adjacency to the former Pinedale Dump, and because that circumstance could expose construction workers and members of the public to hazardous materials. Concerns are also expressed about changes to drainage at the site that could cause the landfill materials to become wet and therefore make them more potentially hazardous. Civil liability is also emphasized. (RFR Sections 3.1.3, 3.2.3 and 3.3.3).

For Alternative 5, the RFR asserts that the alternative promotes visitor safety and use of recreational amenities. It further states that worker exposure to environmental contaminants of concern could be minimized with remediation during the construction widening of the existing private road. No expression of concern about public hazards is provided. (RFR Section 3.4.3).

This very dissimilar treatment in the analysis appears entirely unsupported by the facts disclosed in the RFR and DEIR. The roadway for Route 5b is actually along an alignment that avoids the former Pinedale Dump. It is adjacent along much of its route to the FMFCD storm drainage facility. The fact that the FMFCD storm drainage facility is located at this site reasonably suggests that there is not a significant concern about getting existing landfill materials wet at this location.

Route 5b does site its intended parking lot on what is described as a construction and demolition waste site. However, Alternative 5 sites its parking structure on a similar construction and demolition waste site, albeit at a different location. In any event, a construction and demolition waste site presumably has significantly less hazards than what emanate from a landfill of organic domestic garbage waste that exists in the former Pinedale Dump.

By contrast, Alternative 5 follows an alignment that runs through the former Pinedale Dump, and incorporates a parking lot at location that is near the border of the Former Pinedale Dump and a Construction and Demolition Waste Site. Based on the materials in the Record, it is unfathomable that the RFR analysis concludes that

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Alternative 5 has no environmental constraints respecting the landfills, while such matters render Route 5b infeasible.

The DEIR slightly rectifies the RFR's analysis by detailing the dangers of building upon the former Pinedale Dump, and incorporating three additional mitigation measures to address the matter. The DEIR's additional analysis and mitigation measures seem to prove, however, that the RFR's analysis, which was relied upon by the DEIR in determining that Route 5b was infeasible, was insufficient. As a result, Alternative 5 should not have been held out as the sole feasible option.

d. The DEIR Relies on a Strained Standard for Analyzing Trail Compatibility.

The RFR compares the impacts of Alternative 5 and the various routes and finds that only Alternative 5 is consistent with what it states is a project objective of extending the multipurpose trail downstream from the terminus of this intended Project. (See RFR Section 3.2.4.). That analysis imposes an extraordinarily limited perspective on what can be feasibly attained when it comes to roadways and pedestrian crossings.

With respect to the route alignments and parking facilities illustrated for Routes 5a and 5b, the statement is made that the outermost roadway is at a placement and width that would not allow the trailway to extend along its northern boundary and as a result, any extension of the trail to the south would require a pedestrian crossing over the proposed roadway. It may be desirable to avoid such pedestrian crossings in such circumstance. However, the mere fact that a pedestrian must cross a road (or a car cross a trailway) is not a basis to render an option infeasible. Nor does it justify the claim that circumstance puts in jeopardy the entirety of the objectives of a future project that requires such a crossing. If all interaction between pedestrians and vehicles along the trailway is to be avoided, then avoid placing vehicles and parking lots along the trailway.

With respect to Alternative 5, the RFR's analysis of trail compatibility includes an affirmation that members of the public who might use this point of access may very well park in areas immediately adjacent to the access roadway's intersection with Palm Avenue. It wrongfully assumes, however, that such trail users would focus a parking at the lot for Spano Park. (RFR Section 3.4.4). In fact, however, such trail users will likely impose their parking demands on the property owned by my clients that is immediately adjacent to the proposed Alternative 5 roadway. In this fashion, the DEIR admits an impact of its project on adjacent lands but proposes no mitigation measure for it.

e. The DEIR Relies on an Incomplete Analysis and Incorrect Environmental Baseline Regarding Constructability of the Intended Trail Access.

The RFR finds that the constructability of the roads for Route 5a and 5b are constrained because the land is privately owned, the private owner's future development goals may conflict with developing the route, and the route is near former landfill areas. Additional concerns are noted about the length of the roadway intended for Route 5a, because among the various options, it requires the greatest length of roadway. (RFR Sections 3.15, 3.25)⁷. With respect to Route 5c, the RFR notes simply that the property is privately owned and that the route would conflict with the private owner's future intended improvements. On that basis, the RFR (and DEIR) concluded that each of those Route options were infeasible.

With respect to Alternative 5, the RFR and DEIR place significant reliance on the existence of what it described as a limited public access easement to the existing road. That analysis misconstrues the actual rights under the existing easement. That easement is included as Exhibit 4 (the "Park Place Easement"). The constraints respecting the Park Place Easement rights are more detailed in Section 4 below. However, in this context it is important to emphasize two things about the Park Place Easement.

First, the Park Place Easement confirms that the easement is available for public use only for so long and such times as the Riverview Drive entrance is open for public access under not less than the same terms and conditions as outlined in the Park Place Easement. Because the Project intends to establish public access at Riverview Drive on conditions less burdensome than it intends for the route along the Park Place Easement, all public access rights along the Park Place Easement will terminate by the terms of that easement instrument. Therefore, the RFR and DEIR are misleading when they state that there are limited public access easements available. No such access rights will exist upon the adoption of the Project.

Second, there is a reason the property owner imposed substantial limitation on the terms and conditions of the Park Place Easement. Broader use of that property as a public access to the river bottom is inconsistent with that property owner's intended use of its existing property in the environs of the Park Place Easement.

The RFR and DEIR dismiss Routes 5a, 5b, and 5c on the basis that those routes are inconsistent with what the private property owners intend for future use of their property. However, with respect to Alternative 5, the recommendation is to violate the terms of the limitations in the Park Place Easement that were established

⁷ Curiously, the relative extent of roadway construction between Alternative 5 and Route 5b is nowhere disclosed. If the extent of roadway improvements is a relevant basis for weighing the Route options against one another, such information should be provided in a Recirculated DEIR.

by the property owner to protect its existing developed project. The DEIR reflects lesser respect and concern where an access route violates the goals of the owner of an existing improved project versus those of property owners that have not yet invested in their project development and entitlements.

The intent to disregard easement provisions that protect the value of an existing project will have significant consequences on the constructability of the Alternative 5 access. Any condemnation will have to be valued at acquiring all rights to a public right of way. That will be much more costly than simply modifying rights provided under an existing limited easement.

In addition, that condemnation will need to value the entirety of the severance damages that the intended condemnation will cause to the entirety of the existing Park Place development. Such severance damages will include diminishment in value to the Park Place development property that will arise from the use intended to be obtained by the condemnation. The increased trespass parking from trail users, the consequence of likely vandals, vagrants, homeless encampments, fire risks, and other risks associated with such newly broadened public access to the river bottom, are all items that will be valued. Their impact on the value of the adjacent property will then need to be compensated.⁸

2. Alternative 5 Was Not Properly Incorporated into the Project Description, Resulting in Failure of the EIR to Comply with CEQA's Informational Requirements.

The primary purpose of an EIR is its service as a public informational document. (Public Resources Code Section 21061). If the EIR fails to comply with CEQA's information requirement, the lead agency has abused its discretion and failed to proceed in the manner required by law. (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal. 4th 412, at page 435).

One of the important informational requirements of an EIR is an effective Project Description. A key requirement of a Project Description is that it must depict a precise location and boundary of the project on a detailed map. (CEQA Guidelines Section 15124).

The Project Description detailed in the DEIR describes a project that extends from SR 41 on the east, to Spano Park on the west, and further confirms it extends to a point below the Spano Park overlook. (DEIR Section 1.2, Page 1-2).

⁸ The likelihood and risk of these impacts of public river bottom access to adjacent properties are proven by the adoption of the San Joaquin River and Bluff Protection Initiative, included in Article 15 of Chapter 10 of the Fresno Municipal Code (Section 10-1501 et seq.) Such matters are also evidenced by Public Resources Code Section 32511, which requires the Conservancy to close to the public any lands or facilities that it is not able to maintain for public health and wildlife protection, or to adequately protect the rights of adjacent owners from the public.

The DEIR's Summary Project Location confirms that the study area comprises lands owned by the State of California, and two parcels owned by the City. It also notes that there are three parcels in the study area owned by others that would not be part of the project, which include one privately owned parcel that is occupied by two residences and two parcels owned by the Fresno Metropolitan Flood Control District. The Summary Project Location makes no reference to any other properties. (DEIR Section 1.2, Page 1-3).

The separate Project Location description at Section 2.3 does make reference to some additional privately owned properties lying between the Conservancy lands and the intersection of Palm Avenue and Nees Avenue that might be incorporated into the Project pursuant to Alternative 5. However, Figure 2-2, which includes an illustration of the Project Study Area, does not encompass any delineation of the properties that Alternative 5 actually intends to incorporate into the Project. In addition, those additional properties described in Alternative 5 are actually not located between the Conservancy lands and the intersection of Palm Avenue and Nees Avenue.

As a result, Alternative 5 attempts to incorporate properties that are outside the bounds of what is described in the Project Description and Project Location. This technique effectively buries the description and disclosure of those affected parcels into a 5th Chapter of the DEIR. It constitutes an awkward and misleading approach to incorporate an additional complement of properties into the project description, which violates CEQA.

A result of this technique the DEIR, at Section 2.8, fails to adequately inventory the areas of controversy and issues to be resolved. For instance, Alternative 5 involves significant impacts respecting hazards and hazardous materials resulting from potential construction improvements upon landfills, which creates potentially significant impacts of a type much different than the impacts assessed in the primary chapters of the DEIR. However, the inventory of issues that the EIR is intended to resolve that are detailed in Section 2.8 entirely ignore the issue of the potential impact of the project on existing landfills and their associated hazardous substances.

In addition, as a result of this technique, the DEIR, at Section 2.9, fails to advise the public that the EIR will presumably be relied upon to initiate condemnation of private property. That "discretionary" approval is nowhere listed in the description of intended uses.

The DEIR should therefore be revised to include a proper description of the Project Location, a proper listing of all of the issues resulting from a complete disclosure of that Project Location, and a proper listing of all intended uses of the EIR associated with an accurate description of the intended Project location.

3. Alternative 5 Does Not Serve the Purposes of An EIR Alternatives Analysis and Therefore Does Not Justify Failure to Provide an Appropriate Project Description.

An EIR is required to include a range of reasonable alternatives to a project, or to the location of a project. The purpose of that analysis is to identify alternatives that would feasibly attain most of the basic objectives of the project but would **avoid or substantially lessen any of the significant effects of the project.** (CEQA Guidelines Section 15126.6, emphasis added). The Guidelines further emphasize that the discussion of alternatives "**shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project,...**"

Alternative 5 does not avoid or substantially lessen any of the significant environmental effects of the project. Its inclusion in the DEIR therefore does not serve the purposes of an EIR's required alternative analysis. It can therefore not be used as a device to modify the Project description.

Specifically, Alternative 5 is stated to have potentially significant impacts on aesthetics, biological resources, cultural resources geology and soils, and noise, similar to the impacts projected for the Project. However, Alternative 5 is projected to have greater impacts than the Project on air quality, greenhouse gases, hazards and hazardous materials, hydrology and water quality. There is no class of environmental impacts that Alternative 5 will, if implemented, avoid or substantially lessen. In fact, Alternative 5 requires more mitigation respecting the impact on hazards and hazardous materials than the Project described in the Project Description. (DEIR pages 5-75 through 5-91). Alternative 5 therefore does not qualify as an alternative that is required to be analyzed in an EIR pursuant to CEQA Guidelines Section 15126.6.

The DEIR makes the inaccurate and misleading argument that Alternative 5 was adopted to address limited public access to the River for residents of nearby disadvantaged communities, and more broadly for residents of the Fresno metropolitan area. (DEIR page 5-53). Those are laudable goals. Those are the kinds of goals that should arguably be included in a statement of Project Objectives and thereby be incorporated as elements of a Project Description for the Project that is being primarily evaluated by the DEIR. However, they were not.

The DEIR attempts to claim that environmental justice goals are environmental impacts of a project and that CEQA therefore mandates mitigation measures to address such goals. (DER, Section 4.2, pages 4-17 through 4-21). We are told that travel will have an adverse impact on environmental justice goals. We are also told that the demands for travel, and diminishment in environmental justice, arises because of the need for vehicle travel to the access point intended by the Project

detailed in the Project Description. This adverse impact on supposed "environmental" goals is then used as the basis for inserting Alternative 5 as an "Alternative".

However, attainment of environmental justice goals are not environmental impacts and they are therefore not impacts to be analyzed in an EIR or "mitigated" by imposition of mitigation measures or project alternatives. If environmental justice goals are to be pursued by public projects, then they should be pursued by projects that contain such goals in the project purposes. They should also be supported by projects whose location and other aspects are part of the Project Description that an EIR intends to primarily evaluate.

The attempt of the DEIR to transmute a CEQA analysis of environmental impacts into broader goals of improving health and safety of human beings was recently criticized by the California Supreme Court in *California Bld. Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.App.4th 369, 386-387. CEQA is intended to evaluate the environmental effects of a project. To the extent the impact on humans is relevant to that analysis, that analysis is limited to the impacts on a project's users or residents that arise from the project's effects on the environment. Whether a project is aligned with environmental justice goals, or whether the project will generally impact human beings who are an element of the environment, is not an environmental impact of a project. The DEIR's analysis of the Project's impacts on environmental justice goals is entirely unhinged from any CEQA statutes, guidelines or case law.

Alternative 5 is an alternative that does not avoid or lessen any properly construed environmental impact of the Project. It actually creates more impacts and thereby demands more mitigation measures than the Project. Wrapping environmental justice goals around the analysis does not change the fact that the Alternative 5 does not relate to an alternative that mitigates the projects' environmental impacts.

If Alternative 5 is a desired intended pursuit, it should have been incorporated into the Project Description. It is not proper under CEQA for the Project Description and Project purposes to be increased by shoving sideways additional project elements into an Alternatives Analysis that serves no CEQA objectives. This approach violates CEQA. It also led to a failure of the DEIR to adequately analyze the Project that it apparently intends to support.

4. The Alternative 5 Analysis Fails to Disclose the Proper Environmental Baseline for the Park Place Easement, and the Impact of Substantial Condemnation and Severance Damages On Its Feasibility.

The analysis of Alternative 5, at DEIR Page 5-54, states that there are limited public access easements on the private access roads that the Alternative 5 intends to assess. While that condition does presently exist, as detailed in Section 5 below, the

implementation of the Project will trigger termination of all public access rights along the described private access road. Therefore, any properly conceived environmental baseline for the analysis of the impacts of Alternative 5 should assume that no public access rights exist along the private access road, and all statements inconsistent with that environmental baseline should be discarded because they create a misleading perspective as to the burdens of adopting Alternative 5 as a Project element.

As stated in Section 1(e) above, any proposal to implement Alternative 5 will require a condemnation of private property along the route of proposed Alternative 5. Any condemnation will have to be valued at the costs of acquiring all required rights for a public right of way. That will be much more costly than simply modifying rights provided under an existing limited easement which the DEIR misleadingly suggests would be required.

In addition, that condemnation appraisal will need to value the entirety of the severance damages that the intended condemnation will cause to the entirety of the existing Park Place development. Such severance damages will include diminishment in value to the Park Place development property that will arise from the use intended to be obtained by the condemnation. The increased trespass parking from trail users, the consequence of likely vandals, vagrants, homeless encampments, fire risks, and other risks associated with such newly broadened public access to the river bottom, are all items that will be valued. The fact of such potential impacts to adjacent properties are evidenced by both the San Joaquin River and Bluff Protection Initiative (Fresno Municipal Code Section 10-1501 et seq.) and Public Resources Code Section 32511.

Alternative 5 includes no analysis of the feasibility of implementing that alternative in light of the tremendous expenses that will be associated with attempting to acquire the rights to the access route that it intends.

5. The EIR Fails to Disclose the Impact of the Loss of Rights to Access Pursuant to the Park Place Easement.

The DEIR confirms that pursuant to the Project the Conservancy intends to permanently limit access to the trail from West Riverview Drive to pedestrian and bicycle access (except that public agencies may make vehicular access at the location for maintenance, operations, patrols and emergency response). This circumstance is confirmed as complying with the Fresno 2035 General Plan Policies in POSS-7-g and POSS-7-i. (DEIR at Page 3.149).

However, the DEIR does not explain the impact that the limited public access rights at West Riverview Drive will have on other existing public access rights. It therefore fails to disclose a potentially significant impact of the Project or consider whether such impacts could be feasibly mitigated by recommending changes in Policies POSS-7-g and POSS-7-I and broader public access rights at West Riverview Drive.

Specifically, there is presently an easement that benefits limited rights of public access to the river bottom at a location near Palm and Nees Avenues. This easement, the "Park Place Easement", was previously referenced in Sections 1(e) and 4 above, and is included as Exhibit 4.

The Park Place Easement makes clear that it provides public access only for so long as and such times as the Riverview Drive entrance is open for public access under not less than the same terms and conditions outlined in the Park Place Easement. The Park Place Easement currently allows public access via vehicles in addition to bicycles and pedestrians.

By limiting public vehicle access at West Riverview Drive, the Project ensures that the rights of the public to make vehicular access under the Park Place Easement will terminate. This is an impact of the Project that is not disclosed.

Because the DEIR fails to disclose such Project impacts, it fails to consider feasible mitigations to such Project Impact. That feasibility analysis should also take into account the actual design standards achieved by the roadways developed along Alluvial Avenue and Riverview Drive in assessing their ability to support the Riverview Drive entrance route for additional public vehicle access. The analysis of Alternative 1 as detailed in Chapter 5 of the DEIR confirms that existing public roadway facilities will well support public vehicular access to the intended parkway from the West Riverview Drive access.

6. The DEIR Fails to Analyze or Confirm Mitigations for the Project's Blighting Impacts.

Providing public access to the river bottom will necessarily carry with it impacts associated with increased trespass parking from trail users, and the consequence of likely vandals, vagrants, homeless encampments and fire risks. The existence of those potential impacts to adjacent properties are evidenced by the San Joaquin River and Bluff Protection Initiative (Fresno Municipal Code Section 10-1501 et seq.), which details a long list of prohibited activities in the environs on the river bottom. Those prohibited activities include the following:

- (a) Overnight camping;
- (b) Depositing, placing, throwing or in any manner disposing of any rubbish, trash, garbage, can, bottle, glass, wood, paper or any decaying or putrid matter of any kind;
- (c) Lighting of any fires or open flames, including but not limited to cooking fires and barbecues;
- (d) Possession or use of fireworks;

- (e) Entering, remaining or loitering between the following hours: 10:00 p.m. to sunrise from March through October; 6:00 p.m. to sunrise from November through February;
- (f) Discharging of firearms, bows, pellet guns, or paintball guns except in areas or facilities specifically designated for such activities;
- (g) Removal of vegetation or excavation of any rock or stone;
- (h) Removal or disturbance of archaeological or cultural artifacts; or,
- (i) Removing, defacing, damaging or destroying any sign, gate, garbage can, or structure or facility which has been posted in accordance with other provisions of City Ordinances.

It is clear that the reason each of these nuisance activities are expressly further barred by the terms of the San Joaquin River and Bluff Protection Initiative is because they each relate to activities that have historically created problems for neighbors owning property adjacent to the San Joaquin River along the River Bluff. The San Joaquin River and Bluff Protection Initiative is therefore substantial evidence of the existence of such potentially significant impacts that arise (and increase) as public access to the river bottom is enhanced.

Likewise, Public Resources Code Section 32511 requires the Conservancy to close to the public any lands or facilities that it is not able to maintain for public health and wildlife protection, or to adequately protect the rights of adjacent owners from the public. This statute is similarly substantial evidence of problems created on the San Joaquin River where appropriate funding to protect against noxious uses is not assured.

Unfortunately, despite adopted public policies acknowledging such matters, no aspect of the DEIR includes an analysis of the environmental impacts affecting adjacent property owners associated with increased human activity in the river bottom. The DEIR thereby also proposes no mitigation measures to address the blighting influences that such impacts can have on neighboring property owners.

Because the DEIR fails to analyze these impacts, it also fails to discuss potentially feasible mitigation measures. Several important such measures exist. For instance, the existing San Joaquin River Parkway Master Plan Goals, Objectives and Policies provide, at RTP-4, that operating plans for each Parkway segment should be developed in conjunction with affected local jurisdictions to include access control locations, park hours, fees and enforcement provisions. However, the DEIR does not access how this policy has been implemented.

In addition, and more importantly, the mitigation measure might simply focus on providing the public assurances that the requirements of Public Resources Code



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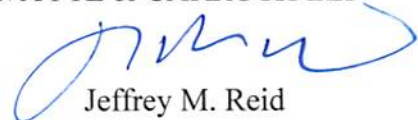
Section 32511 are implemented. This should include a requirement that no portion of any development of the Project be implemented until operating funds to assure the requirements of Public Resources Code Section 32511 are identified. Further, the operational budgets necessary to assure such standards should be subject to a noticed public hearing for complete public input and evaluation. Such measures are very feasible and would simply focus on assuring that standards of existing laws and policies are attained.

7. The EIR Requires Revisions to Assure a Proper Project Description and Appropriate Public Information Disclosures, Which Impose a Duty to Recirculate the Revised DEIR for Further Public Review.

As detailed above, the DEIR violates important CEQA standards. Addressing those requirements will involve substantial revisions to the DEIR document.

Public Resources Code Section 21092.1 provides that when a lead agency adds "significant new information" to an EIR after completion of consultation with other agencies and the public but before certifying the EIR, the lead agency must pursue an additional round of consultation." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, at p. 447). New information is "significant" where "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, at p. 1129; accord, CEQA Guidelines Section 15088.5(a)). It is clear that the revisions required for the DEIR will involve disclosure of significant new information that will require recirculation for further public review and comment. We look forward to the opportunity to comment on the recirculated DEIR materials.

Sincerely,
McCORMICK, BARSTOW, SHEPPARD,
WAYTE & CARRUTH LLP



Jeffrey M. Reid

enc. Exhibits A through D

cc: Mr. Cliff Tutelian
San Joaquin River Conservancy Board Members
Mr. Michael Crow, Esq., Deputy Attorney General
Ms. Sharon Waver, Executive Director, San Joaquin River Parkway & Conservation Trust, Inc.